A

VENU NAIR & ANOR v. PUBLIC BANK BHD

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
ZALEHA YUSOF JCA
MARY LIM JCA
B [CIVIL APPEAL NO: W-02(IM)(NCC)-1618-10-2015]
7 MARCH 2017

CIVIL PROCEDURE: *Judgment and orders – Execution of judgment – Judgment against legal firm – Application to execute judgment against partners of legal firm allowed by High Court – Appeal against – Whether issue of liability had to be first determined by High Court granting any leave to execute – Issue of O. 77 r. 5(5) of Rules of Court 2012 raised in memorandum of appeal but not before High Court – Whether parties bound by pleadings – Whether appeal ought to be dismissed*

C

D

The respondent appointed a legal firm ('the defendant') to be their solicitor to prepare the loan security documentation for a loan to one Polyidaman Sdn Bhd ('Polyidaman'). As a security for the loan, Polyidaman duly executed a charge over its property in favour of the respondent. When Polyidaman defaulted on its loan, the respondent discovered that the charge had been discharged and the property had been transferred to a third person. It was
E also discovered that the discharge document contained a forged signature of one of the respondent's officers and witnessed by one Frankie Tan who was a partner of the defendant. The respondent then commenced the main suit to claim for the damages caused by the defendant's negligence, fraud and breach of contract and duty of care. The High Court on 30 November 2012
F awarded judgment in favour of the respondent. On 10 March 2014, the respondent received notification from the Bar Council that the defendant had ceased operations and that there were four partners of the defendant at the date of the discharge of the charge *ie* on 1 November 2006. The respondent filed an application under O. 77 r. 5(4) of the Rules of Court 2012 ('ROC')
G *vide* encl. 71 to execute the judgment against all four partners and the application was allowed by the High Court on 26 August 2015. Hence, the present appeal by two of the partners ('appellants'). On appeal, the appellants relied on O. 77 r. 5(5) of the ROC. The appellants contended that where partners like the appellants had clearly disputed their liability; what the court
H should have done was to order the issue of liability to be first tried and determined before granting any leave to execute. On the other hand, the respondent objected to the appellants raising the issue of O. 77 r. 5(5) of the ROC as this was a new issue and never raised before the High Court. Therefore, the respondent contended that this appeal ought to be dismissed.

I

Held (dismissing appeal)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) The issue of O. 77 r. 5(5) of the ROC was never raised in the High Court. Nowhere in the appellants' affidavits to oppose the application did the appellants raise the issue that their liability should be tried first before leave to execute the judgment was granted. Neither was it argued in their respective submissions. The appellants had never averred or sought the court to determine their liabilities first before allowing encl. 71. Although the appellants now raised this issue in their memorandum of appeal, the court could not and should not allow it. (paras 13 & 18)

(2) The liability of the appellants as partners of the defendant had in fact been raised and decided by the trial judge in the main suit. The trial judge in the main suit had held that the defendant was liable and that all partners of the defendant which would of course include the appellants, were also jointly liable. This decision had been affirmed by the Court of Appeal. The result of this was that the court had to proceed with this appeal on the basis that the previous decision *ie* the trial judge's decisions, was correct. Once the court has decided on a particular matter or issue, the matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (para 20)

(3) The fact that the appellants claimed that they were innocent partners and were not involved in the fraud committed by Frankie Tan could not divert them of their responsibility in law under the Partnership Act 1961. Any action done, wrongful or otherwise, by any partners shall bind the firm and all the other partners. Therefore, the appellants herein, as decided correctly by the trial judge in the main suit were liable jointly and severally with Frankie Tan and also their firm, the defendant in the main suit. (paras 21 & 22)

Per Mary Lim JCA (dissenting):

(1) The grounds raised by the appellants went towards disputing liability and for a dismissal of the leave sought. The High Court Judge is obliged to exercise her discretion guided by the provisions of r. 5(5). The sub-rule provides that the court 'may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined'. The issues, especially the matter of the operations or otherwise of the firm, which was the primary basis upon which the respondent initiated the application, were real issues for consideration. (para 55)

(2) Enforcement actions especially in the nature and form of bankruptcy proceedings have far-reaching and unamendable consequences. Care and proper appreciation of the full facts must be undertaken. Where there is

A doubt, it should be in the favour of the party responding to the application unless there is clear judgment against that party. Since the judgment was against and in the name of the firm, and not the appellants, who though found accountable as a firm, had disputed their personal liability. That was certainly a valid concern which required proper
B evaluation. (para 56)

(3) The matter of whether the firm was still in operation, laches, and the matter of the insurance cover raised by the appellants together with the arguments on the application or otherwise of the principles of *res judicata*, were valid issues. These issues were not available and were not
C issues raised in the earlier trial. These *bona fide* issues have to be properly tried. Full and proper arguments should be accorded as that is the objective and intention behind r. 5(4). In the circumstances, the appeal must be allowed. (paras 58 & 60)

***Bahasa Malaysia** Headnotes*

D

Responden melantik sebuah firma undang-undang ('defendan') sebagai peguam cara mereka bagi menyediakan dokumen-dokumen cagaran untuk pinjaman kepada Polyidaman Sdn Bhd ('Polyidaman'). Sebagai cagaran untuk pinjaman, Polyidaman melaksanakan satu cagaran ke atas hartanya yang memihak kepada responden. Apabila Polyidaman memungkiri bayaran
E balik pinjamannya, responden mendapati bahawa cagaran tersebut telah dilepaskan dan harta tersebut dipindahkan kepada pihak ketiga. Juga didapati bahawa dokumen pelepasan mengandungi tandatangan palsu salah seorang pegawai responden dan disaksikan oleh Frankie Tan, seorang rakan kongsi defendan. Responden kemudiannya memulakan suatu tindakan utama
F menuntut ganti rugi yang disebabkan oleh kecuaian defendan, penipuan dan pelanggaran kontrak dan kewajipan berjaga-jaga. Mahkamah Tinggi pada 30 November 2012 mengawardkan penghakiman yang memihak pada responden. Pada 10 Mac 2014, responden menerima maklumat dari Majlis Peguam bahawa defendan telah berhenti beroperasi dan bahawa terdapat
G empat rakan kongsi defendan pada tarikh pelepasan cagaran iaitu pada 1 November 2006. Responden memfailkan permohonan di bawah A. 77 k. 5(4) Kaedah-Kaedah Mahkamah 2012 ('KKM') melalui lampiran 71 untuk melaksanakan penghakiman tersebut terhadap keempat-empat rakan kongsi dan permohonan tersebut dibenarkan oleh Mahkamah Tinggi pada
H 26 Ogos 2015. Oleh itu, rayuan ini oleh dua rakan kongsi defendan ('perayu'). Atas rayuan, perayu bergantung kepada A. 77 k. 5(5) KKM. Perayu menghujahkan bahawa jika rakan kongsi seperti perayu mempertikaikan dengan jelas liabiliti mereka; apa yang sepatutnya dilakukan oleh mahkamah adalah untuk memerintahkan isu liabiliti dibicarakan dan diputuskan
I sebelum memberikan apa-apa kebenaran pelaksanaan. Sebaliknya,

responden membantah perayu membangkitkan isu A. 77 k. 5(5) KKM kerana ini merupakan isu baru dan tidak pernah dibangkitkan di Mahkamah Tinggi. Oleh itu, responden menghujahkan bahawa rayuan ini harus ditolak.

Diputuskan (menolak rayuan)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Isu A. 77 k. 5 (5) KKM tidak pernah dibangkitkan di Mahkamah Tinggi. Perayu tidak membangkitkan isu bahawa liabiliti mereka perlu dibicarakan terlebih dahulu sebelum mendapatkan kebenaran pelaksanaan penghakiman dalam mana-mana afidavit perayu untuk membantah permohonan. Begitu juga, ia tidak dikemukakan dalam hujahan mereka. Perayu tidak pernah menegaskan atau memohon kepada mahkamah untuk menentukan liabiliti mereka terlebih dahulu sebelum membenarkan lampiran 71. Walaupun perayu membangkitkan isu ini dalam memorandum rayuan sekarang, mahkamah tidak boleh dan tidak harus membenarkan isu ini.

(2) Liabiliti perayu sebagai rakan kongsi defendan telah sebenarnya dibangkitkan dan diputuskan oleh hakim bicara dalam tindakan utama. Hakim bicara dalam tindakan utama memutuskan bahawa defendan adalah bertanggungan dan semua rakan kongsi defendan termasuk perayu, juga bersama-sama bertanggungjawab. Keputusan ini telah disahkan oleh Mahkamah Rayuan, atas rayuan. Keputusan ini adalah bahawa mahkamah perlu meneruskan rayuan ini atas dasar bahawa keputusan sebelum ini iaitu keputusan hakim bicara, adalah betul. Apabila mahkamah membuat keputusan mengenai sesuatu perkara atau isu tertentu, perkara atau isu yang mengikat pada peringkat kemudiannya dalam tindakan yang sama atau dalam tindakan berikutnya.

(3) Fakta bahawa perayu mendakwa bahawa mereka adalah rakan-rakan kongsi yang tidak bersalah dan tidak terlibat dalam penipuan yang dilakukan oleh Frankie Tan tidak dapat mengalihkan mereka daripada tanggungjawab mereka dalam undang-undang di bawah Akta Perkongsian 1961. Apa-apa tindakan salah yang dilakukan atau sebaliknya oleh mana-mana rakan kongsi akan mengikat firma tersebut dan semua rakan-rakan kongsi lain. Oleh itu, perayu, seperti diputuskan dengan betul oleh hakim bicara dalam tindakan utama, adalah bertanggungan secara bersesama dan berasingan dengan Frankie Tan dan juga firma mereka, defendan dalam tindakan utama.

Oleh Mary Lim HMR (menentang):

(1) Alasan-alasan yang dibangkitkan oleh perayu menunjukkan pertikaian liabiliti dan untuk penolakan kebenaran yang dipohon. Hakim Mahkamah Tinggi diwajibkan menggunakan budi bicara beliau berpandukan peruntukan k. 5(5). Peruntukan ini memperuntukkan bahawa mahkamah 'may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined'. Isu-isu, terutama mengenai isu operasi atau sebaliknya firma, yang merupakan asas utama di mana responden memulakan permohonan, adalah isu-isu sebenar untuk dipertimbangkan.

(2) Tindakan penguatkuasaan terutamanya dalam sifat dan bentuk prosiding kebankrapan mempunyai kesan yang mendalam dan tidak boleh dipinda. Sifat berhati-hati dan pertimbangan fakta yang penuh harus dilaksanakan. Jika terdapat keraguan, ia seharusnya memihak kepada pihak yang bertindak balas terhadap permohonan tersebut melainkan jika terdapat penghakiman bertentangan yang jelas terhadap pihak tersebut. Oleh kerana penghakiman adalah terhadap firma dan atas nama firma, dan bukan perayu, yang walaupun didapati bertanggungjawab sebagai firma, telah mempertikaikan liabiliti peribadi mereka. Ini sudah pasti kebimbangan sah yang memerlukan penilaian yang betul.

(3) Isu sama ada firma masih beroperasi, kelengahan, dan hal perlindungan insurans yang dibangkitkan oleh perayu bersama-sama dengan hujahan mengenai permohonan atau prinsip *res judicata*, adalah isu-isu yang sah. Isu-isu ini tidak diperolehi dan bukan isu yang dibangkitkan dalam perbicaraan sebelum ini. Isu-isu *bona fide* ini harus dibicarakan dengan sepenuhnya. Penghujahan penuh harus diberikan kerana ini adalah objektif dan niat disebalik k. 5(4). Oleh itu, rayuan harus dibenarkan.

Case(s) referred to:

Dato' Tan Chin Woh v. Dato' Yalumallai V Mutusamy [2016] 8 CLJ 293 FC ***(refd)***
Government of Malaya v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus [1996] 1 BLJ 423 HC ***(refd)***
Public Bank Bhd v. Paul Cheah & Associates; Frankie Tan Lyn Seang (Third Party) [2012] 1 LNS 831 HC ***(refd)***
S Mariappan v. The Government of Malaysia [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 FC ***(refd)***
Union of India v. Manohar Lal Narang and Another [1977] 2 All ER 348 ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 23
Limitation Act 1953, s. 32
Partnership Act 1961, ss. 7, 8, 12, 14
Rules of Court 2012, O. 77 rr. 1, 4, 5(1), (4), (5), 6(2)
Rules of the High Court 1980, O. 77 r. 5(5)
Subordinate Courts Rules 1980, O. 10 r. 5(5)

For the appellants - Low Weng Tchung; M/s Weng & Co
For the respondent - Goh Meng Yew & Farida Zohra Khalir; M/s Iza Ng Yeoh & Kit

[Editor's note: For the High Court judgment, please see Public Bank Bhd v. Paul Cheah & Associates [2016] 10 CLJ 598 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Zaleha Yusof JCA:

[1] The respondent in this appeal was the plaintiff in the main suit before the High Court. The defendant in the main suit was a legal firm known as Paul Cheah & Associates (the said firm).

[2] The appellants in this appeal were partners of the said firm.

[3] The respondent had appointed the said firm to be their solicitor to prepare the loan security documentation for a loan to one Polyidaman Sdn Bhd (Polyidaman). As security for the loan, Polyidaman had duly executed a charge under the National Land Code over its property in favour of the respondent.

[4] However, when Polyidaman defaulted on its loan, the respondent discovered that the charge had been discharged and the property had been transferred to a third person and that the same property was now charged to CIMB Bank Bhd as security for that third person's loan. It was also discovered that the discharge document contained a forged signature of one of the respondent's officers and witnessed by one Frankie Tan Lyn Seang (Frankie Tan) who was a partner of the defendant.

[5] To cut the story short, the respondent had commenced the main suit to claim for the damages caused by the defendant's negligence, fraud and breach of contract and duty of care. After a full trial, the High Court had on 30 November 2012 awarded judgment in favour of the respondent. The decision of the High Court was affirmed, on appeal by the defendant, by the Court of Appeal on 5 August 2013.

[6] It was the respondent's contention that it only received the sealed judgment dated 30 November 2012 on 20 February 2014. On 10 March 2014, it received notification from the Bar Council that the defendant had ceased operation and that there were four partners of the defendant at the date of the discharge of the charge ie, on 1 November 2006.

[7] The respondent had filed an application under O. 77 r. 5(4) of the Rules of Court 2012 encl. (71) to execute the judgment against all these four partners; and the application was allowed by the High Court on 26 August 2015. Hence, the appeal before us by two of the partners, the appellants in this appeal.

[8] Having perused the record of appeal and considered the submissions made by learned counsel for the respective parties, by a majority decision, this appeal was dismissed with cost and the decision of the High Court was affirmed. We shall now give our reasons for dismissing the appeal.

Our Grounds

[9] Before us, learned counsel for the appellants only relied on one issue ie, O. 77 r. 5(5) of the Rules of Court 2012. It was his argument that where the partners like the appellants in this appeal had clearly disputed their liability; what the learned judge should have done was to order the issue of liability to be first tried and determined before granting any leave to execute. Especially so in this case where in the main suit only the firm was sued and not the partners. He relied on a High Court case of *Kumpolan Kemajuan Raya Sdn Bhd v. Faidz Darus* [1996] 1 BLJ 423; [1996] 5 MLJ 35 wherein it was *inter alia* held that the judgment taken against the firm though final on the record, was open to challenge on an application for leave to execute against the partners because pursuant to O. 10 r. 5(5) of the Subordinate Court Rules, (which was similar to O. 77 r. 5(5) of the Rules of the High Court 1980) the individual partner had a right to challenge the liability. If he did, according to that case, the court might order that his liability be tried and determined before such leave could be granted.

[10] Learned counsel for the appellants further argued that as the personal liberties of the appellants were at stake due to the intention of the respondent to execute the judgment by way of bankruptcy proceeding against the appellants, the word "may" as found in O. 77 r. 5(5) ought to be interpreted to mean "shall". He referred to the House of Lord's decision in *Union of India v. Manohar Lal Narang and Another* [1977] 2 All ER 348 to support his contention.

[11] On the other hand, learned counsel for the respondent objected to the appellants raising this issue of O. 77 r. 5(5) as this was a new issue and never raised before the learned High Court Judge. Since this was now the sole ground of appeal before this court, he urged this court to dismiss this appeal. He found support in the Federal Court's decision in *S. Mariappan v. The Government of Malaysia* [1983] 2 CLJ 124; [1983] CLJ (Rep) 382; [1983] 2 MLJ 340 wherein Abdul Hamid FJ (as His Lordship then was), delivering the judgment of the court had stated as follows:

> … As a starting point we refer to a passage in *Mallal's Supreme Court Practice* at page 917 under the heading "Points not taken in Court below." The principle that emerges from the authorities, fundamentally, is that the Court of Appeal will not consider an issue which has not been raised before, particularly on a point not argued in the court below and which did not appear specifically in the pleadings …

[12] In any event, learned counsel for the respondent further submitted that the liability of the appellants as partners of the defendant had in fact been raised and decided by the learned trial judge in the main suit. The learned trial judge had already ruled that the other partners of the defendant were liable for the wrongful action of Frankie Tan and that the appellants were jointly liable for the loss and damage suffered by the respondent.

[13] We had perused the record of appeal which was contained in only one bundle, and found that it was true that the issue of O. 77 r. 5(5) was never raised in the High Court. Nowhere in their affidavits to oppose the application did the appellants raise the issue that their liability should be tried first before leave to execute the judgment was granted. Neither was it argued in their respective submission. However, we noted that in their memorandum of appeal, the appellants did raise the issue as follows:

> The learned judge erred in law in failing to appreciate that as the Appellants had disputed their liability under the judgment dated 30.11.2012, the learned judge ought to have ordered that the liability of the Appellants first be tried and determined pursuant to Order 77 Rule 5(5) of the Rules of Court 2012.

[14] Now, the appellants contended that the learned High Court Judge erred in failing to appreciate the provision of O. 77 r. 5(5). But if it was never raised and never argued before her, how could she be said to have erred?

[15] The Federal Court had recently in *Dato' Tan Chin Woh v. Dato' Yalumallai V Mutusamy* [2016] 8 CLJ 293; [2016] 5 MLJ 590 held *inter alia* as follows:

> (1) While it is true that the Court of Appeal could consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s. 69(4) of the CJA and r. 18(2) of the Rules of the Court of Appeal 1994, this was subject to the overriding discretion of the court to do justice. Where the justice of the case required a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court could allow a new point to be argued. However, in so doing, it was not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it was also trite that parties in litigation were bound by the four corners of their pleadings …

[16] Like pleadings, whatever assertion made by a party in his affidavit, shall bind him. In his affidavit to oppose encl. (71), the first appellant merely raised the issue of delay by the respondent in filing encl. (71), that he was not liable as a partner because the fraud committed by Frankie Tan was a criminal act and not an act relating to the business of the kind carried on by

A the defendant, and that there was in existence a settlement agreement between the defendant and Pacific & Orient Insurance Co Bhd as a result of which the defendant had withdrawn the third party proceedings against Pacific & Orient Insurance Co Bhd; and that it was premature for the respondent to enforce the judgment against the partners of the defendant as
B the defendant was still operational.

[17] On the part of the second appellant, except on issue of delay, his affidavit to oppose encl. (71) also contained the same averment.

[18] Therefore, we agreed with the respondent that the appellants had never
C averred or sought for the court to determine their liabilities first before allowing encl. (71). And as mentioned earlier, they had never brought this issue up at the submission stage before the High Court too. Therefore, although the appellants had now raised the issue in their memorandum of appeal, following the Federal Court in *Dato' Tan Chin Woh, supra,* we could not and should not allow it as it had gone beyond the four corners of their
D affidavits, which like pleadings, they were bound to.

[19] In any event, we had read the decision of Justice Mah Weng Kwai (as he then was) who heard the main suit which could be found in the respondent's bundle of authority, *Public Bank Berhad v. Paul Cheah*
E *& Associates; Frankie Tan Lyn Seang (Third Party)* [2012] 1 LNS 831. One of the issues dealt with by the learned judge was whether the defendant could be sued as a firm. He answered the issue *inter alia* as follows:

> In view of the findings of facts made above, the court is of the view that the defendant must be held accountable for the loss suffered by the
F plaintiff.
>
> The defendant in particular Frankie Tan, knowing that the Plaintiff's loan to Polyidaman was still outstanding and that the Redemption Sum had not been paid had no reason whatsoever to witness the forged signature of Khoo So Yin on Form 16N to discharge the Plaintiff's Charge. Due to the fraudulent Discharge of Plaintiff's Charge, the transfer of the
G property to Shahrol and the wrongful registration of CIMB's Charge, the Plaintiff has lost its security for the loan to Polyidaman. All these events took place due to the fraudulent conduct of Frankie Tan and his breaches of the duty of care and contract owed to the Plaintiff. The complicity of Frankie Tan in this criminal venture is evident. Without redeeming the property, Frankie Tan managed to secure a loan of RM800,000 from
H CIMB. The money was disbursed into the HSBC Account operated by the Defendant at its Head Office where presumably it remains till today.
>
> All the partners of the defendant in the Head Office as well as in the Subang Jaya Branch are jointly liable for the loss and damages suffered by the plaintiff due to the fraudulent acts, negligence and breaches of
I contract committed by Frankie Tan. In the law of partnership there is no

distinction between the branches and the Head Office in so far as liability is concerned. The conveyancing practice of the Subang Jaya branch was the ordinary business of the firm. The fact that Frankie Tan had carried out the transactions in respect of the property in a fraudulent manner does not exempt the firm from being liable under Section 12 of the Partnership Act 1961. The fact that the transactions were carried out through illegal means is irrelevant to the determination that the transactions were within the ordinary course of business of the defendant. A partner who is ignorant of the offence committed by his partner is still liable for the same offence as a partner (see *Clode v. Barnes* [1974] 1 All ER 1166). And in *Alan Michael Rozario v. Merbok MDF Sdn Bhd* [2011] 1 CLJ 433 it was held that although the 2nd defendant was "not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter did not absolve him in law under Partnership Act 1961, of his liability as a partner of the firm at the material time. The 2nd defendant's obligation and liability to the plaintiff under the Letter of Undertaking was pursuant to his being a partner of the firm and not his knowledge or express authorisation of it").

[20] Based on the above, we could not but agree with learned counsel for the respondent that the liability of the appellants as partners of the defendant had in fact been raised and decided by the trial judge in the main suit. The learned trial judge in the main suit had held that the defendant was liable and that all partners of the defendant which would of course include the appellant, were also jointly liable. This decision had been affirmed by the Court of Appeal, on appeal. The result of this is that we must proceed with this appeal on the basis that the previous decision ie, the trial judge's decisions, was correct. Once the court had decided on a particular matter or issue, the matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. See *Government of Malaya v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74.

[21] We were of the view that the fact that the appellants claimed that they were innocent partners and not involved in the fraud committed by Frankie Tan could not divert them of their responsibility in law under the Partnership Act 1961 as revised on 1 July 1974 (Act 135). The provisions of ss. 7, 8 12 and 14 of Act 135 are very clear on this point. They are as follows:

7. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual was business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

A

> 8. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.
>
> 12. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.
>
> 14. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 12 or 13.

B

C

[22] Those provisions show that any action done wrongful or otherwise by any partners shall bind the firm and all the other partners. Those provisions especially ss. 12 and 14 make the appellants herein, as decided correctly by the trial judge in the main suit, liable jointly and severally with Frankie Tan and also their firm, the defendant in the main suit.

D

[23] We also bore in mind that Act 135 is a specific Act relating to partnership. Hence, it prevails over any other law on this issue of partners' liability. We were of the view that the provisions of Rules of Court 2012 could not override Act 135. See s. 23 of the Interpretation Acts 1948 and 1967 (Act 388).

E

Conclusion

[24] For the reasons above stated, we did not find any merit in this appeal. We therefore affirmed the decision of the High Court and dismissed this appeal with cost of RM4,000 to be paid by each appellant to the respondent subject to payment of allocatur. We also ordered the deposit to be refunded.

F

Mary Lim JCA (dissenting):

[25] The two appellants were once partners of the legal firm of Messrs Paul Cheah & Associates ("the firm"). The respondent was a client of the firm. The respondent successfully sued the firm and judgment for the sum of RM561,483.62 together with interest thereon and costs of RM207,335 ("the judgment") was entered after trial on 20 November 2012. The firm's appeal was dismissed by the Court of Appeal on 5 August 2013.

G

H

[26] The respondent sought leave to execute the judgment against the appellants and two other partners of the firm under O. 77 r. 5(4) of the Rules of Court 2012. The respondent was seeking to initiate bankruptcy proceedings against them. The appellants and one other partners objected and filed affidavits in opposition. Despite their objections, leave was granted by the learned High Court Judge. Two of the three partners who objected, appealed.

I

[27] No grounds were available at the time of the hearing of the appeal. However, given that it is an appeal against an interlocutory order, we decided to proceed sans grounds. Upon hearing all counsel, this court, by majority dismissed the appeal. This is my dissenting decision.

[28] These are the relevant facts. The respondent appointed the firm to be its solicitors *vide* letter of appointment dated 3 December 2003. The firm was required to prepare loan security documentation for a RM750,000 loan that the respondent was providing to a company known as Subang Aquatic Services Sdn Bhd (previously known as "Polyidaman Sdn Bhd") towards the construction of its factory premises. Subang Aquatic Services Sdn Bhd executed a charge in favour of the respondent over the property upon which the factory was built. When Subang Aquatic Services Sdn Bhd defaulted in the loan repayments, the respondent decided to initiate foreclosure proceedings. It appointed a real estate valuer to value the property in question.

[29] It was at that point, that the respondent learnt that the property had been discharged without its knowledge. Upon discharge, the property was transferred to one Shahrol @ Sahrol bin Mat Sum ("Shahrol") and the property was charged to CIMB Bank Berhad pursuant to a loan that CIMB Bank Berhad had granted to Shahrol on 1 November 2006. It appeared that the firm had been appointed by CIMB Bank Berhad as its solicitors to perfect loan security documentation in respect of a loan to Shahrol. A Form 16N discharging the respondent's charge was purportedly signed by one of the respondent's officers, Khoo So Yin and witnessed by Frankie Tan Lye Seang, a partner of the firm at the material time. That signed Form 16N was subsequently presented to the land office for registration by the firm. The respondent claimed that Khoo So Yin's signature was forged.

[30] The respondent sued the firm claiming damages caused by the firm's negligence, fraud, breach of the letter of appointment, solicitor guidelines, retainer and/or breach of duty of care. The firm defended the claim. After a full trial, judgment was entered in favour of the respondent. The High Court's decision was affirmed by the Court of Appeal on 5 August 2013.

[31] The present appeal relates to actions taken by the respondent towards executing that judgment against not the firm, but the partners of the firm.

Application For Leave Under O. 77 r. 5(4) Of The Rules Of Court 2012

[32] According to the application filed by the respondent, leave pursuant to O. 77 r. 5(4) of the Rules of Court 2012 was sought to execute personally against four named partners of the firm by way of bankruptcy proceedings; namely:

A i. Sulaiman bin Mohd Said, the second appellant;

ii. Lee Choon Hei;

iii. Venu Nair, the first appellant; and

iv. Tan Lye Seang, Frankie.

B

[33] In its application, the respondent claimed that the judgment of 30 November 2012 was only sealed by the court on 20 February 2014; and that it was seeking to execute against the four partners of the firm as the firm had ceased operations since 10 March 2014. The respondent relied on its verification with the Bar Council in commencing the application for leave to C execute against the appellants.

[34] Insofar as the present appellants are concerned, although they filed separate affidavits in opposition to the application, their grounds of objection were substantially the same. One other partner, Lee Choon Hei had also D opposed the application but he has not appealed. His papers are therefore not before us.

[35] In essence, the appellants denied knowledge of and legal responsibility for the discharge and the criminal and fraudulent acts of Frankie Tan Lye Seang and one Chow Kah Wai, a legal assistant of the firm; denied that these E persons had authorisation to act or that these acts were acts conducted in the ordinary course of the business of the firm; that they were not personally liable as they were not partners of the firm at Subang since they operated out of the firm's branch in the city, Kuala Lumpur and at the Taman Gembira branch in Klang. The appellants further alluded to proceedings that the firm F had initiated against its insurers, Pacific & Orient Insurance Berhad; that agreement was reached between the firm and the insurers in that the insurers had agreed to provide cover to the firm in relation to the matters complained of by the respondent.

[36] The appellants further alleged that contrary to the respondent's G contentions, the firm was still in operation. It was therefore, not fair for the respondent to rely on the status of the firm as at 10 March 2014. The appellants further contended that the enforcement of the judgment was barred by laches under s. 32 of the Limitation Act 1953. In his submissions before us, learned counsel for the appellants explained that the sum effect of these H grounds was that the appellants' personal liability was still an open issue. While the firm was liable and that the acts of the partners bind the firm and bind each partner, execution was only in respect of the firm's assets, and not the partners personally. To do that, the personal liability of the partner had to be established and this was never done. Order 77 r. 5(4) required that partners who are similarly circumstanced ought to be given leave to defend I

that issue of personal liability before execution may be pursued. It was the appellants' submission that the exercise of discretion by the learned High Court Judge was erroneous in law and on the facts.

[37] The respondent disagreed. Its basic argument is that the liability of the appellants as partners of the firm at the material time has already been clearly established. The respondent relies substantially on the provisions of the Partnership Act 1961 for that purpose. Learned counsel for the respondent submitted that under ss. 7 and 8 of the Partnership Act 1961 (Act 135), "every partner is an agent of the firm and his other partners for the purpose of the business of the partnership". Section 7 further provides that "the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular manner, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner". Since the appellants were, undeniably, partners of the firm at the material time of the event complained of, that is the wrongful discharge of the property, the judgment could be executed against the appellants personally.

[38] Section 8 is said to further fortify the respondent's contention in that it provides that an "instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners …" Frankie Tan Lye Seang's witnessing of the signature on the relevant Form 16N on 19 October 2006, *albeit* forged, fell within the type of acts done by the partner and the firm that was in the course of the firm's business in the usual way. In short, it was the ordinary business of a form for a lawyer to witness documents and to present Form 16N for registration at the land office.

[39] Learned counsel for the respondent further submitted that ss. 12 and 14 provide that any wrongful action done by any partner in the ordinary course of business of the firm binds the firm and the partners, jointly and severally. According to the respondent, since the judgment procured against the firm has not been paid by the firm, it is "now time to execute that judgment against the partners" of the firm at the relevant time. Towards that end and for that reason, leave was sought under O. 77.

[40] It would appear that the learned High Court Judge was not persuaded by these arguments as leave to execute personally against the appellants was granted.

[41] At the hearing of this appeal, the respondent contended that the appellants were not at liberty to raise this new ground, that the issue of their liability needed to be tried first before leave to execute may be considered. Since this was not one of the original grounds before the learned High Court Judge, this court should not allow submissions on this point at this stage of the appeal. It was not open to the appellants to raise this complaint for the first time before us and that the principle of *res judicata* applied to estop the appellants from re-litigating the issue.

[42] With respect, I find this argument without merit. On the contrary, the respondent's counter argument puts paid to this complaint. The respondent submitted that this issue of the appellants' liability for the acts of the errant partner had already been dealt with by Justice Mah, the trial judge in the case which led to the judgment. Justice Mah, in essence found that the fact that the transactions were carried out through illegal means is irrelevant to the determination that the transactions were within the ordinary course of business of the defendant. A partner who is ignorant of the offence committed by his partner is still liable for the same offence as a partner. The trial court found the partners liable for the wrongful actions of Frankie Tan even if they had no knowledge or had not authorised the actions.

[43] It is necessary to scrutinise the respondent's application. It was specifically for leave to enforce the judgment through bankruptcy proceedings against four of five partners. There was no action against one Lim Choon Wee as he had passed away on 31 October 2012.

[44] As for the remaining partners, three of the four partners objected to the application with their reasons reflected in the affidavits filed. The other partner, the erstwhile Frankie Tan Lye Seang did nothing. On this score alone, there should have been a careful examination of the different bases adopted by the persons or partners responding to the application. Clearly, there is no distinction drawn between the four partners as leave was granted in respect of all four partners. This lack of distinction gives some foothold to the allegation that there was an improper exercise of discretion under O. 77, in particular r. 5(4).

[45] Evidently, O. 77 r. 5 applies as the respondent's application itself seeks to move the court under that specific rule. The respondent acknowledged that the appellants and that would extend to all the other partners were never sued in the action which led to the judgment. It was the firm that was sued even though it was open to the respondent to sue both the partners, and that would extend to each and every one of them, in the same proceedings taken against the firm. That is entirely permissible under the Partnership Act 1961 as well as under O. 77 of the Rules of Court 2012. Order 77 r. 1 clearly provides for this course of conduct:

1. Action by and against firms within jurisdiction

Subject to the provisions of any written law, any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued, in the name of the firm, if any of which they were partners at the time when the cause of action accrued.

[46] Order 77 of the Rules of Court 2012 contain specific rules on actions against and by partners and their firms. These procedural rules provide that claimants are at liberty to sue the partnership as a firm or the several partners of the firm. Where the partners are sued as partners in the name of their firm, or where the writ is served personally on the partners, these affected partners are obliged to enter appearances in their own names and not that of the firm – see r. 4.

[47] When judgment is secured against a firm, execution to enforce the judgment is against any property of the firm. This is expressed in r. 5(1):

(1) Where a judgment is given or an order is made against a firm, execution to enforce the judgment or order may, subject to rule 6, issue against any property of the firm within the jurisdiction.

[48] Rule 6 deals with execution to enforce a judgment or order given or made in actions by or against a firm in the name of the firm, against or by a member of the firm; or actions by a firm in the name of the firm against a firm in the name of the firm where those firms have one or more members in common. In such instances, leave of the court is required. Order 77 r. 6(2) provides that in hearing these applications, the court may give such directions as may be just including directions as to the taking of accounts. This rule does not apply to the present factual scenario as the respondent is not a firm which had initiated the action against a member of the firm.

[49] Be that as it may and because the respondent says that the firm has since ceased operations, and because the respondent never cited or sued the partners personally, it now wants to enforce the judgment against the partners personally. For that purpose too, there is clear provision under the Rules of Court 2012 as to the respondent's next course of conduct. Order 77 r. 5(4) provides:

5. Enforcing judgment or order against the firm

(4) Where a party who has obtained a judgment or an order against a firm claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that party may apply to the Court for leave to issue execution against that person, the application to be made by notice of application which must be served personally on that person.

[50] The respondent's application is in reliance on r. 5(4). However, r. 5(4) must be read with r. 5(5) which provides:

> (5) Where the person against whom an application under paragraph (4) is made does not dispute his liability, the Court hearing the application may, subject to paragraph (3), give leave to issue execution against the person and, where that person disputes his liability, the Court may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

[51] Evidently, r. 5(5) provides for what happens when there is dispute on liability and where there is none. Where liability is not disputed, the court may give leave to issue execution. This is however, subject to para. (3) which deals with the concerns of whether the partner in question is or is not within jurisdiction at the material time when the writ was issued. This position is not relevant on the present facts save in relation to the two partners who did not dispute the application.

[52] What is relevant in this appeal is the case of the two appellants who disputed liability. Rule 5(4) provides specifically that where the partner disputes his liability, "the court may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined". I am fully aware that the court is vested with discretion as to whether to grant leave or otherwise and as to the consequential directions or orders that may be required where liability is disputed. But given that the whole object behind the issue of leave, and this is also apparent from r. 6, is the matter of what is 'just', real and meaningful effect must be given to the exercise of this discretion. It certainly cannot mean that the judge hearing the application embarks on an exercise to consider let alone determine the merits of the dispute.

[53] In considering its exercise of discretion as to whether to grant leave and order the issue of personal liability of the appellants be tried and determined in any manner, the court should consider whether those issues are genuine or real. The court only needs to consider them at a *prima facie* level, to see if these issues warrant any trial or determination.

[54] While the trial court may have said that "all the partners of the defendant in the head office as well as in the Subang Jaya Branch are jointly liable" for the wrongful actions of Frankie Tan even if they had no knowledge or had not authorised the actions, that was so as to find the firm liable, regardless the actions of whichever the branch of the firm. Justice Mah had clearly opined that "in the law of partnership there is no distinction between the branches and the head office insofar as liability is concerned". That is still, a long way from finding several personal liabilities against the

appellants. I must add that I view with concern that in relation to these appellants, a copy of the judgment of Justice Mah was also not before the court to at the very least, assist the court to appreciate the meaning and effect of the judgment.

[55] The grounds raised by the appellants go towards disputing liability and for a dismissal of the leave sought. The appellants may not have clearly articulated that they wanted leave to defend or to try and determine the issues they have raised, and the Rules should not be read any differently just because the appellants here are legally qualified, the learned High Court Judge was obliged to exercise her discretion guided by the provisions of r. 5(5). That sub-rule provides that the court "may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined". The issues, especially the matter of the operations or otherwise of the firm, which was the primary basis upon which the respondent initiated the application in the first place, are real issues for consideration of some arguable merit.

[56] Enforcement actions, especially in the nature and form of bankruptcy proceedings, have far-reaching, sometimes unamendable consequences. Care and proper appreciation of the full facts must be undertaken. Where there is doubt, it should be in the favour of the party responding to the application unless there is clear judgment against that party. Since the judgment is quite obviously against and in the name of the firm, and not the appellants, who though found accountable as a firm, have disputed their personal liability. That is certainly a valid concern which requires proper evaluation.

[57] Looking at the chronology of events and the explanation for the intervals between one action and the next, it becomes patently clear that that too, warrants closer examination which appears not to have been carried out. An exercise of discretion given by law is very much influenced by facts and the conduct of the parties. The sense of fair play and justice will always be paramount and override technical concerns. In this case, the respondent had secured the judgment on 30 November 2012. The Court of Appeal had affirmed that judgment on 5 August 2013. Information on the operation of the firm and the partners was obtained from the Bar Council on 10 March 2014. Yet, the execution proceedings against the partners were only initiated seven months later, on 24 October 2014. According to the respondent, a sealed copy of the judgment was only obtained on 20 February 2014. I find the chronology of these events and the account for the intervals meriting scrutiny.

[58] In my view, these issues especially the matter of whether the firm is still in operation, laches, and the matter of the insurance cover raised by the appellants together with the arguments on the application or otherwise of the

principles of *res judicata*, are valid issues. These issues were not available and were not issues raised in the earlier trial. These *bona fide* issues have to be properly tried, argued and determined. The arguments may well culminate in the same verdict as that previously reached, but it is obvious that the stage of the application for leave is no place for such determination. Full and proper arguments should be accorded as that is the objective and intention behind r. 5(4). Otherwise, r. 5(4) will serve to offer mere window dressing.

[59] Rule 5(4) offers a right of challenge where enforcement is sought against the person of the partner and not against the assets or property of the firm. It is not reasonable to say that because the appellants, especially the first appellant represented the firm in the proceedings that led to the judgment, then he is prohibited from disputing the respondent's application for leave. In my judgment, attending and defending proceedings on behalf of the firm is quite different in more respects than one from when one appears to defend on one's own personal behalf. The implications are immediately and obviously different. The respondent made that choice to start with though it could have sued the appellants and the other partners personally. It did not. It chose not to. It is not for the respondent to now deny the appellants their fundamental right of challenge embedded in r. 5(4) and (5).

[60] For all the above reasons, the appeal must be allowed. The appellants must be given leave to defend their liability. The case ought to be remitted to the High Court for case management and for further directions towards a trial and determination of that liability.